UNITED STATES
v.
ERNEST R. TERRY AND OTTO R. STOCKER

IBLA 72-417 Decided March 26, 1973

Appeal from a decision of the Administrative Law Judge Dent D. Dalby declaring that the patent application for the Bellview lode mining claim be denied and that the final certificate be canceled.

Affirmed as modified.

Mining Claims: Discovery: Generally

Evidence of mineralization which might warrant further exploration work within a claim rather than development of a mine is not sufficient to constitute a discovery of a valuable mineral deposit.

Mining Claims: Discovery: Generally

To constitute a discovery upon a lode mining claim there must be an exposure in the claim of a lode or vein bearing mineral which would warrant a prudent man in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuble mine.

Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally

The prudent man test is objective not subjective and is not met by allegations that the claimant could derive a simple livelihood from it through a one-man operation aided by the gratuitous assistance of friends.

Mining Claims: Contests -- Mining Claims: Determination of Validity -- Rules of Practice -- Government Contests

In a Government contest against the validity of a mining claim, a finding of lack of discovery determines that the claims are invalid and the Administrative Law Judge errs in refusing to

declare it invalid even if the contestant does not request such a declaration.

APPEARANCES: H. L. McChesney, Esq., Goldman, McChesney & Datsopoulous, Missoula, Montana for appellant; Garry V. Fisher, Esq., Office of the Solicitor, Department of the Interior, Billings, Montana, for the government.

OPINION BY MR. RITVO

Ernest R. Terry 1/ has appealed from a decision, dated April 24, 1972, of the Administrative Law Judge 2/ holding that there was no discovery of a valuable mineral deposit within the limits of his Bellview mining claim, rejecting the patent application, and canceling the final certificate.

This case was initiated by the issuance of a complaint by the Bureau of Land Management challenging the validity of the mining claim on the basis that valuable minerals had not been found within the limits of the claim in sufficient quantity and quality to constitute a discovery under the mining laws.

The Bellview lode mining claim was first located in 1928 by Terry and one Gilbert Betters. Terry and Stocker filed amended location notices on October 4 and 19, 1960. They filed a patent application on February 9, 1962. A hearing was held on November 11, 1971, at Missoula, Montana.

After thoroughly examining all the evidence concerning the issue of discovery, and setting forth his finding of facts, the Judge concluded, in his decision of April 24, 1972, "(t)he evidence in this case indicates that, at most, the mining claimant might be justified in further exploratory work on the claim." He then found that there had been no discovery within the limits of the claim, denied the patent application and canceled the final certificate which had been issued pursuant to the patent application.

The standard applied by the Department of the Interior to determine the validity of mining claims is well established. A discovery sufficient to validate a mining claim has been made:

1/ Prior to the hearing, contestee Otto R. Stocker advised the Administrative Law Judge that he had no interest in the case. The appeal, therefore, is on behalf of only Ernest R. Terry.
2/ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787.

> * * * [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *. Castle v. Womble, 19 L.D. 455, 457 (1894).
>
> And where the location is of minerals in a lode or vein:
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> * * * [T]here must be a vein or lode of quartz or other rock in place; the quartz or other rock in place must carry gold or some other valuable mineral deposit; and the two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine. Jefferson-Montana Copper Mines Co., 41 L.D. 320 (1912).

This test has been accepted by the Courts and the Department, United States v. Coleman, 390 U.S. 599, 602 (1968); Best v. Humbolt Placer Mining Co., 371 U.S. 334 (1963); Chrisman v. Miller, 197 U.S. 313, 322 (1905); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969): United States v. William J. Bartels, Sr., 6 IBLA 124 (1972); Ray L. Stevens, A-31052 (May 14, 1970); East Tintic Consolidated Mining Co., 43 L.D. 79, 81 (1914).

It is not enough that mineral values exposed might justify further prospecting or exploration to determine whether actual mining operations would be warranted, Cabot Sedgwick v. B. H. Callahan, 9 IBLA 216 (1973).

The appellant stresses the contention that he could mine the claim in a manner profitable to him, with the aid and gratuitous assistance of friends. This, of course, falls far short of meeting the "prudent man" test. The determination of the validity of a claim cannot rest upon such peculiar individual circumstances. The criteria are objective not subjective. United States v. Harper, 8 IBLA 357, 367 (1972).

We adopt and attach hereto the decision of the Judge insofar as it sets out the facts of this case and the applicable law concerning the matter of discovery.

The Judge went on to state: "The Contestant does not ask that the Bellview claim be declared invalid. It requests only denial of the patent application and cancellation of the final certificate in

order to leave Terry in possession of the claim to further pursue his quest for a minable ore. This request is granted." (Brief, p. 5.)

In its complaint, the United States had asked that the mining entry be canceled and the claim declared null and void. As the Judge noted, the Government counsel asked for limited relief in his brief.

The question is raised, therefore, when, in a contest brought on an application for a mining patent, it is determined that no discovery has been made on the claim, the necessary result of this determination is that the mining claim is invalid, even though the Department asks only for the rejection of the application for patent.

The Department has considered this question extensively several times and has repeatedly ruled that when there is no discovery as defined by the mining laws within the limits of a contested claim, the claim is null and void. Cabot Sedgwick v. B. H. Callahan, supra, 224, 229; United States v. William J. Bartels, Sr., supra; United States v. Baranof Exploration and Development Company, 72 I.D. 212 (1965); United States v. Carlile, 67 I.D. 417 (1960).

The claim must be declared null and void even though the Judge found only that there was no discovery, United States v. Baranof Exploration and Development Company, supra, or specifically refused to go beyond holding that there was no discovery, Cabot Sedgwick v. B. H. Callahan, supra, at 229, 230; United States v. Cascade Ornamental Building Stone Inc., 8 IBLA 447 (1972).

Accordingly, there being no discovery within the limits of the claim, it must be declared null and void. 3/ The Judge's decision is modified to this extent.

3/ In Cabot Sedgwick v. B. H. Callahan, supra, it was stated:

"Having found that a discovery of a valuable mineral deposit does not exist within the limits of any of the claims, the Judge stated that he would not extend his authority beyond such finding, that is, he would not declare them null and void. We do not agree with the position expressed by the Judge that the subject mining claims should not be declared null and void. The following comment from Carlile, supra, [229-230] is illuminating:

'What is the effect of a declaration of invalidity? It is that the mining claimant has acquired no rights against the United States; he has no exclusive right of possession to the land in his claim which is property in the fullest sense of the word. If the United

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Martin Ritvo, Member

I concur:

Joseph W. Goss, Member.

I dissent in part:

Frederick Fishman, Member

(fn. 3, cont.)
States wishes to withdraw the land in the invalidated claim or otherwise dispose of it under the public land laws, it can do so. If the land has already been included in a withdrawal or some other form of disposition, the withdrawal will attach to the land or the prior disposal will remain unimpaired. No further notice to the claimant or further proceedings against the claim are necessary to achieve these results.

'If, however, at the time of invalidation of the claim for lack of discovery the land has not been withdrawn or otherwise disposed of, the claimant may resume occupation of the land, or remain in occupation, and so long as he is engaged in persistent and diligent prosecution of work looking to a discovery have pedis possessio. But until he makes a discovery, he had no rights against the United States and the United States can withdraw or otherwise dispose of the land without giving him further notice. In other words, he has the same status as anyone seeking to make a mining location on land open to mining.'

"The sine qua non of a valid mining claim is a discovery of a valuable mineral deposit. Therefore, the contested claims are null and void, and the Judge's decision is modified to that extent." (229-230.)

Frederick Fishman, dissenting in part.

The main opinion properly holds that the mining claim patent application was correctly denied. However, I believe that the main opinion unnecessarily declares the mining claim null and void.

The able Judge stated:

> "The Contestant does not ask that the Bellview claim be declared invalid. It requests only denial of the patent application and cancellation of the final certificate in order to leave Terry in possession of the claim to further pursue his request for a minable ore * * *. This request is granted."

The majority opinion relies in part on Cabot Sedgwick v. B. H. Callahan, 9 IBLA 216, 230 (1973) which states in part as follows:

> "The sine qua non of a valid mining claim is a discovery of a valuable mineral deposit. Therefore the contested claims are null and void, and the Judge's decision is modified to that extent." (Last emphasis supplied.)

The inherent vice of this reasoning is the assumption that a claim is either valid or invalid, despite the fact that there are thousands of mining claims on the public lands which fall into neither category. See my dissent in United States v. William J. Bartels, Sr., 6 IBLA 124, 143 (1972) which explains my position that United States v. Carlile, 67 I.D. 417 (1960) (the genesis of the concept that a mining claim must be declared null and void if a discovery of valuable mineral is not established), is in error. I would affirm the decision of Judge Dalby.

April 24, 1972

DECISION

UNITED STATES OF AMERICA, Contestant v. ERNEST R. TERRY and OTTO R. STOCKER, Contestees
MONTANA 1828

Involving the Bellview lode mining claim, situated in Sec. 17, T. 12 N., R. 16 W., Principal Meridian, Missoula County, Montana

The Manager of the Montana Land Office, Bureau of Land Management, Department of the Interior, issued a complaint pursuant to 43 CFR 4.451 challenging the validity of the Bellview mining claim. The complaint charged, among other things, that valuable minerals have not been found within the limits of the claim in sufficient quantity and quality to constitute a discovery under the mining laws. Ernest R. Terry answered for himself and on behalf of Otto R. Stocker, denying the allegation that the claim is invalid.

A hearing on the complaint was held at Missoula, Montana, on November 11, 1971. The Contestant was represented by Mr. Garry V. Fisher, Office of the Solicitor, Department of the Interior, Billings, Montana. Contestee Terry was represented by Mr. H. L. McChesney, Goldman, McChesney and Datsopoulos, Missoula, Montana. Contestee Stocker advised prior to the hearing that he had no interest in the case.

Findings and Conclusions

The Bellview lode mining claim was located by Gilbert Betters and Contestee Terry on May 18, 1928, for gold, silver, copper and other valuable metals. Terry and Stocker filed amended location notices on October 4 and 19, 1960 (Exhibit C-4).

The claim is located near the western end of the Garnet Range. The bedrock is an igneous grandiorite rock which is jointed,

faulted and weathered to a depth of several feet. A small fissure vein is exposed near the claim lode base which appears to be developed along a fairly persistent fault zone. It contains an appreciable amount of iron oxide and hematite, some malachite, chrysocolla, azurite, pyrite and chalcopyrite (Tr. 8, 9). The fissure has a maximum width of about three feet but generally runs approximately two feet. Mineralized chutes, usually less than six inches, occur within the fault zone (Tr. 9, 10). There are seven old hand-dug pits on the claim, two caved adits and one new adit which extends about 55 feet into the hillside (Tr. 10, 11).

Robert Newman, a Bureau of Land Management mining engineer, examined the claim on November 1, 2, 3, 4 and 9, 1965, September 14, 1966, August 24 and December 12, 1967, July 18, 1969, September 15, 1970, and September 8, 1971 (Tr. 7). During these inspections he obtained 24 mineral samples, 15 of which were from the exposed vein on the claim. One of these was assayed for silver and molybdenum, four for silver, gold and copper, and the remainder for silver, gold, copper and lead (Exhibits G-4 through G-9).

Newman computed the value of the mineral content of the samples, as shown by the assays, based upon the American Smelting and Refining Company's schedule of payments for ores and concentrates dated January 1, 1971. Eight of the samples had no significant mineral value. The rest had values ranging from $.38 per ton to $147.70 per ton. The average value, excluding the sample assayed for molybdenum, was $17.52 per ton (Exhibit G-12). The samples taken across the exposed vein averaged $23.73 per ton. The smelter cost for processing ore is $19.00 per ton. This would indicate a net return of $4.73 per ton of ore based upon the average of the samples taken from the vein.

However, according to Newman, the lowest direct mining costs (exclusive of capital cost, taxes and insurance) would be $20.00 per foot of advance (Tr. 30). One-tenth of a ton of ore from the 18-inch vein could be obtained for each foot of advance (Tr. 50). Consequently, the assays of Newman's vein samples would indicate a net return of $4.73 per ton for direct mining costs of $200.00 per ton.

Contestee Terry is 77 years of age. He was blinded in 1916 by drilling into a powder charge while working in the Butte mines and is now dependent upon a pension for the blind (Tr. 52). He lives in a cabin on the claim "every summer and sometimes in

the winter up until the middle of February" (Tr. 53). Since about 1928 he has personally mined the claim with the gratuitous help of friends. He operates an electric drill and jackhammer, drills holes in the face of the mine, sets powder charges, ignites fuses, hauls the rock out of the mine and separates the ore from the waste by touch (Tr. 53, 54). He also timbers his mine using trees from the claim (Tr. 57, 61, 71). Terry originally started mining in an old tunnel that caved (Tr. 53). He opened up a new tunnel on the vein at a higher elevation with the help of his uncle (Tr. 58).

Terry testified that two carloads of ore were taken from the old tunnel by a lessee (Tr. 53) and that he also shipped some ore from the tunnel (Tr. 56). One truckload of ore has been shipped from the new tunnel by a lessee (Tr. 59). At the time of the hearing, Terry had removed about three tons of ore but was waiting to collect a truckload of eight tons before shipping to the smelter (Tr. 63). Terry introduced assays of five mineral samples. The best sample assayed at 16.76 percent copper and 813 ounces of silver per ton. He testified that this sample was taken from a little streak of rich ore from the center of a 14-inch vein (Tr. 66). Because of the highly selective nature of this sample it cannot be considered as representative of any ore values that could be expected from a mining operation. No explanation was offered as to how or where the remaining four samples were taken or what monetary values were represented. This evidence does not suggest that a profitable mining operation could presently be undertaken on the Bellview claim.

Terry's exploration efforts are fueled by the hope of uncovering a valuable ore deposit. As he expressed it (Tr. 71):

> I figure I'm going to run into a bunch of ore and probably make some money off of it, so I can live properly. There is always a chance, you know. When you are on one of those veins, it could widen out to two or three feet wide. I know a place about a mile from there, a fellow started on a little vein about an inch wide, and he went in about four feet and hit a body of ore and took out $30,000.00.

Ronald B. Parker, an experienced exploration geologist who examined the Bellview claim, gave support to Terry's hope "to run into a rich bunch of ore and probably make some money off of it." He testified that Terry "has reasonable expectation on the basis of not only the production history of the

rest of the Clinton district, but also on the basis of the geology of his own claim to believe that he's going to uncover one or more ore shutes as he continues his drift on the structure." (Tr. 91).

A discovery of a valuable mineral deposit is essential to validate a mining location. A discovery exists:

> [W]here minerals have been found and evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine . . . Castle v. Womble, 19 L.D. 455, 457 (1894), . . .

The test of "valuable" is whether the mineral can be extracted, removed and marketed at a profit. United States v. Coleman, 300 U.S. 599 (1968).

In this case, the evidence establishes that the cost of extraction is far in excess of the value of the recoverable ore. No prudent person would expend his labor and means in the development of a mine on the basis of the present showings of mineralization. The fact that Terry, stimulated by the hope of making a rich strike, is willing to do so does not validate the claim.

In Chrisman v. Miller, 197 U.S. 313 (1905), some oil had been found seeping at the surface within the limits of an oil placer mining claim. The Supreme Court of the United States stated:

> It does not establish a discovery. It only suggests a possibility of mineral of sufficient amount and value to justify further exploration. (p. 320)

The Court then accepted as necessary to constitute a discovery of a valuable mineral deposit the following:

> . . . the mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral. (p. 322)

In the Coleman decision, supra, the Supreme Court stated with respect to the term "valuable mineral deposits":

> . . . Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable . . . (p. 602)

The evidence in this case indicates that, at most, the mining claimant might be justified in further exploratory work on the claim.

The Contestant does not ask that the Bellview claim be declared invalid. It requests only denial of the patent application and cancellation of the final certificate in order to leave Terry in possession of the claim to further pursue his quest for a minable ore (Brief, p. 3). This request is granted.

The patent application is denied and the final certificate is cancelled.

Dent D. Dalby
Hearing Examiner